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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RODERICK CAUCHON et al.,

Plaintiffs and Respondents,

v.

FOREST RIVER, INC.,

Defendant and Appellant.

D053864, D054433

(Super. Ct. No. GIC869626)

CONSOLIDATED APPEALS from a judgment and orders of the Superior Court of San Diego County, Yuri Hofmann, Judge. Affirmed.

Roderick and Diane Cauchon sued Forest River, Inc. alleging they purchased a new motorhome manufactured by Forest River that was a "lemon" under the Song-Beverly Consumer Warranty Act (the Act). (Civ. Code, § 1790 et seq.; undesignated statutory references are to this code.) A jury found that the motorhome failed to perform as represented in the Forest River Limited Warranty (the Warranty), and that Forest River could not get the motorhome to conform to the Warranty after a reasonable number of attempts and

awarded compensatory damages and statutory penalties in the amounts of \$205,700.86 and \$52,211.00, respectively. The trial court later awarded the Cauchons their attorney fees and costs.

Forest River appeals, contending: (1) the special verdict form was defective; (2) its warranty obligations were discharged as a matter of law; (3) the asserted defect did not fall within the scope of the Warranty; (4) it was entitled to additional offsets against the damages awarded; (5) the trial court erroneously excluded evidence of the Cauchons' finances; (6) the evidence did not support the award of civil penalties; and (7) the trial court abused its discretion when awarding the Cauchons their attorney fees. We affirm the judgment and orders denying Forest River's motions for judgment notwithstanding the verdict and new trial, and awarding the Cauchons' their attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

Forest River does not challenge the sufficiency of the evidence supporting the verdict and the parties are well aware of the facts of this dispute. Accordingly, we merely summarize the facts presented at trial to provide some background for our later discussions.

In October 2005, the Cauchons purchased a Forest River Charleston motorhome from La Mesa RV Center, Inc., in San Diego, California. The total purchase price for the motorhome was \$195,257.24, composed of the following: (1) \$180,000.00 purchase price; (2) \$45.00 document preparation fee; (3) \$13,953.49 sales tax; (4) \$1,250.00 license fee; and (5) \$8.75 California tire fee. The Cauchons made a down payment of \$120,000 and financed the balance. By the time of trial, the Cauchons had paid \$19,695.75 in interest and principal on the loan; the pay-off amount to clear the balance on the loan was \$70,439.11. The

Cauchons purchased the motorhome to take their daughter on a year-long trip across the country. At the end of the trip, they anticipated purchasing a home in Arizona to fix up, and living in the motorhome until they could move into their new home.

On the day the Cauchons purchased the motorhome, they experienced problems with the "leveling jacks" used to level the vehicle when it is parked on an uneven surface. After several hours, the electrical power died, forcing the Cauchons to hook the motorhome to external power. Although they received a replacement part to remedy the power problem, they continued to have electrical problems with the "coach" or living portion of the motorhome.

At the end of October, the Cauchons took the motorhome to La Mesa RV to repair the electrical system and leveling jacks, but the problems continued. In December 2005, La Mesa RV again repaired the electrical system, but the problems continued. The Cauchons experienced other problems with the motorhome, including a leaking water tank. In February 2006, Forest River agreed to take the motorhome to its factory in Indiana for repair, with Forest River reimbursing the Cauchons for the mileage put on the vehicle. However, after the repair, the water tank still leaked and the Cauchons experienced ongoing problems with the electrical system and the leveling jacks. Because of all the problems with the motorhome, Forest River extended the Warranty until February 2007.

In May 2006, the Cauchons asked Forest River to repurchase the motorhome after they continued to experience problems with the electrical system and the leveling jacks. Forest River refused this request, and a second request made the following month through the Cauchons' attorney. In July 2006, they sued Forest River for breach of the Act. Despite

the onset of litigation and the development of a new problem with the master bedroom slide-out, the Cauchons left for their trip because they had sold their home and quit their jobs.

During the trip, the problems with the electrical system, leveling jacks and slide-out persisted. The Cauchons stayed in contact with Forest River because the motorhome was still under warranty. In October 2006, the Cauchons headed west after deciding to end their trip early. They lived in the motorhome until July 2007, when they moved into their new home in Arizona.

In June 2008, the matter proceeded to trial, with the jury returning a verdict in the Cauchons' favor. The jury awarded \$205,700.86 in compensatory damages, \$3,143.23 in incidental damages, and \$52,211.00 in statutory penalties. The trial court denied Forest River's motions for a new trial and judgment notwithstanding the verdict, and awarded the Cauchons \$170,000 in attorney fees. Forest River timely appealed from the judgment, the posttrial motions, and the order granting the Cauchons their attorney fees.

DISCUSSION

I. *The Act*

The Act is a remedial statute designed to protect consumers who have purchased products covered by an express warranty. (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 121.) It requires a manufacturer to replace "consumer goods" or reimburse the buyer if the manufacturer or its representative is unable to repair the consumer good after a reasonable number of attempts. (§ 1793.2, subd. (d)(1).) The Act similarly provides that if a manufacturer or its representative in this state fails to repair a "new motor vehicle" to

conform to any express warranty after a reasonable number of attempts to repair, the manufacturer must replace the vehicle or pay restitution. (§ 1793.2, subd. (d)(2).)

A "new motor vehicle" includes "the chassis, chassis cab, and that portion of a motor home devoted to its propulsion, but does not include any portion designed, used, or maintained primarily for human habitation" (§ 1793.22, subd. (e)(2).) Nonetheless, a California consumer of a motorhome with defects in the coach (the unit designed for human habitation that is attached to a motor vehicle chassis) may invoke the provisions of the Act that are applicable to consumer goods. (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1074, 1083.)

A plaintiff pursuing an action under the Act has the burden to prove that (1) the product had a nonconformity covered by the express warranty that substantially impaired the use, value or safety of the product; (2) the product was presented to an authorized representative of the manufacturer for repair; and (3) the manufacturer or its representative did not repair the nonconformity after a reasonable number of repair attempts. (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1101 (*Oregel*).) "The reasonableness of the number of repair attempts is a question of fact to be determined in light of the circumstances, but at a minimum there must be more than one opportunity to fix the nonconformity. [Citation.]" (*Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 799.) For new motor vehicles there is a *presumption* of failure to conform to warranty within a reasonable number of attempts after four repairs of the same nonconformity and notification to the manufacturer of the need for repair. (§ 1793.22, subd. (b)(2).)

II. *Characterization of the Motorhome as a "Consumer Good"*

The trial court concluded that the alleged defects in the motorhome experienced by the Cauchons related to the portion of the motorhome used primarily for human habitation, and did not relate to the propulsion system of the motorhome. Based on this conclusion, and over Forest River's objection, the trial court used a special verdict form based on CACI VF-3202, pertaining to "consumer goods," as opposed to CACI VF-3203 covering "new motor vehicles."

Although not clearly articulated, a major theme pervading many of Forest River's arguments on appeal is the concept that the trial court erroneously characterized the motorhome as a "consumer good," not as a "new motor vehicle." Forest River argued below that the trial court should use the verdict form for new motor vehicles (CACI VF-3203), not the verdict form for consumer goods (CACI VF-3202). Forest River, however, never argued to the trial court that it had erroneously characterized the litigation as involving a consumer good. Assuming without deciding that Forest River made this argument below, it failed to repeat it in its opening brief with any reasoned argument or citations to authority.

Accordingly, we treat the issue as waived. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

III. *The Verdict Form*

Forest River contends it is entitled to a new trial because the trial court used an improper verdict form. It asserts that the verdict form did not: (1) require the jury to find that the nonconformity was within the scope of the Warranty, as opposed to the warranties of the respective manufacturers of the component parts; (2) tie the "reasonable repair attempts"

language of the statute to a single specific nonconformity; (3) require any finding of a nonconformity which substantially impaired the use, value or safety of the motorhome; and (4) did not properly instruct the jury on the manner of calculating damages for a new motor vehicle under section 1793.2, subdivision (d)(2)(B).

We reject Forest River's argument that the verdict form failed to require the jury find that the nonconformity was within the scope of the Warranty. Question number 2 of the verdict form asked the jurors whether Forest River gave the Cauchons "a warranty." If the jurors answered yes, they were asked to answer question number 3: "Did the motor home fail to perform as represented in the warranty?" The verdict form mentioned no other warranties; thus, the term "the warranty" in question number 3 necessarily referred back to the Forest River warranty referenced in question number 2.

We also reject Forest River's argument that the verdict form used by the court erroneously failed to tie the "reasonable repair attempts" language of the statute to a single specific nonconformity. The two CACI forms (CACI VF-3202 & 3203) are very similar. Both ask the jury whether the defendant failed to repair the item to conform to its warranty after a reasonable number of opportunities. Additionally, neither CACI form required that the jury tie the repair attempts to a particular nonconformity, and Forest River cited no authority to support its argument that the verdict form needed to tie the repair attempts to a particular nonconformity.

Thus, we conclude there was no error because the verdict form given to the jury correctly asked whether Forest River or its authorized repair facility failed to repair the consumer good to conform to the written warranty after a reasonable number of

opportunities. Moreover, the trial court correctly instructed the jury that the Cauchons could obtain damages only if Forest River or its representatives failed to repair the motorhome "after a reasonable number of opportunities."

Forest River complains that the verdict form erroneously failed to require any finding of a nonconformity which substantially impaired the use, value or safety of the motorhome. In contrast, CACI VF-3203 governing new motor vehicles asks whether the vehicle had "a defect covered by the warranty that substantially impaired the vehicle's use, value, or safety" Forest River, however, never specifically argued to the trial court that, based on the defects alleged by the Cauchons, the motorhome should be considered a "new motor vehicle" and not a "consumer good." Nor did Forest River make this specific argument in its opening brief.

In any event, as Forest River acknowledges, the trial court properly instructed the jury that the motorhome needed to be free of a "substantial defect in materials and workmanship" and "[i]n deciding whether a reasonable person would believe that the motor home's defects, if any, substantially impaired the motor home's use, value or safety" the jury could consider certain factors such as the nature of the defects and past repair attempts. Thus, when the jury found that the motorhome had failed to perform as represented in the Warranty, they necessarily found a defect in the motorhome existed that substantially impaired its use, value or safety. Accordingly, even assuming the trial court erred by using a verdict form for consumer goods, the assumed error was not prejudicial.

Finally, Forest River asserts that due to the trial court's use of an improper verdict form, the jury received improper instructions on the manner of calculating damages for a

new motor vehicle under section 1793.2, subdivision (d)(2)(B). It claims that had the trial court used the verdict form relating to new motor vehicles, the damages award would have been \$10,000 lower. The parties correctly agree that the same measure of damages applies to both a consumer good and a motor vehicle. (§§ 1793.2, subd. (d), 1794.) Additionally, although the trial court based the verdict form on CACI-VF 3202 pertaining to consumer goods, it modeled that part of the verdict form addressing damages after CACI-VF 3203, pertaining to motor vehicles. Namely, the verdict form directed the jury to determine the purchase price, including financing, down payment, payments made and loan payoff. Thus, Forest River's argument is not a challenge to the verdict form; rather, it amounts to a challenge to the evidence supporting the jury's damages calculation. Accordingly, we turn to the jury's finding and the evidence.

Forest River challenges that portion of the jury's calculation determining the purchase price of the motorhome. It contends the jury should have determined the purchase price of the motorhome as \$198,400.47. The jury, however, calculated the purchase price as \$210,134.86. Substantial evidence supports the jury's calculation.

The Cauchons presented evidence that they made a down payment of \$120,000.00, payments for interest and principal of \$19,695.75, and that the loan pay-off amount was \$70,439.11. When these numbers are added together, the total is \$210,134.86, the exact amount calculated by the jury as the purchase price.

Forest River argues that the Cauchons paid no finance charges by valuing this item at \$0. It asserts that the Cauchons did not present any evidence as to the amount of finance charges they paid on the motorhome because the document they tried to proffer was never

entered into evidence and they did not separately establish finance charges. While Forest River is correct that the Cauchons did not present a figure showing how much they paid in finance charges, it can be reasonably inferred that to the extent the sum of the purchase price, down payment, payments made and loan payoff exceeded the actual purchase price, that the excess amounted to the finance charges that the Cauchons paid.

In summary, we reject Forest River's challenges to the verdict form and the damages award.

IV. Discharge and Scope of the Warranty

A. Terms of the Warranty

The Warranty states that Forest River warrants to the purchaser "that the body structure of this recreational vehicle shall be free of substantial defects in material and workmanship attributable to [Forest River]" for one year, or 12,000 miles, whichever came first. It expressly provides:

"EXCLUSIONS FROM THIS WARRANTY: . . . [Forest River] makes no warranty with regard to the motorhome chassis, including, without limitation, the engine and drive train, any mechanical parts or systems of the chassis, tires, tubes, batteries and gauges, routine maintenance, equipment and appliances, or audio and/or video equipment and appliances. Some of these items may be warranted by their respective manufacturers and suppliers. . . ."

The Warranty further states that Forest River made no warranty "with regard to any product used . . . as a permanent residence" and specified certain events that would discharge it from its obligations, including "misuse or neglect" or use "as a permanent residence."

The owner's manual informed the purchaser that the manufacturer of the chassis warranted it, not Forest River. The owner's manual further stated: "Depending on your RV's

equipment, the following warranties are provided with your unit." This section listed 24 items, including: air conditioner, generator, power converter, water pump (potable water), batteries, and power level jacks.

B. Discharge of Warranty

Forest River contends that its warranty obligations were discharged as a matter of law because the evidence presented at trial revealed that the Cauchons had misused the motorhome by making it their permanent residence before they sold their home in California, and again when they moved to Arizona. Application of this defense turns on whether the Cauchons used the motorhome as their permanent residence, a question of fact. We reject Forest River's argument that we can decide the matter as a question of law based on the Cauchons' testimony regarding the time periods they lived in the motorhome.

In any event, even assuming the issue is one of law that can be decided based on undisputed facts, there is nothing in the record showing Forest River presented this "legal issue" to the trial court either before or during trial. Because this argument is raised for the first time on appeal, it has been waived. (*Lucich v. City of Oakland* (1993) 19 Cal.App.4th 494, 498 (*Lucich*).) To the extent Forest River presented this factual issue to the jury, the jury rejected it by finding that "unauthorized or unreasonable use" of the motorhome following its sale did not cause it to fail to perform as warranted.

C. Scope of Warranty

Forest River contends that, as a matter of law, the problems the Cauchons experienced with the air conditioner, water pump, leveling jacks, and batteries in the coach portion of the motorhome were excluded from coverage. Accordingly, Forest River asserts the judgment

should be reversed and the trial court instructed to direct a verdict in its favor. We reject this contention for several reasons.

Although Forest River claims this issue can be decided as a matter of law, it cited no portion of the record showing it asked the trial court to determine that warranty coverage did not exist for any of the defects alleged by the Cauchons. Thus, this argument has been waived. (*Lucich, supra*, 19 Cal.App.4th at p. 498.) Additionally, while Forest River sought to exclude evidence relating to complaints concerning parts manufactured by others, or that were excluded from its warranty, the trial court denied the motion without prejudice, noting that Forest River should object as the evidence was presented, and that the jury would eventually need to resolve the issue regarding what defects were covered by the Warranty. Forest River does not argue on appeal that the trial court abused its discretion regarding the scope of admissible evidence concerning the defects. To the extent Forest River argued this matter to the jury, the jury impliedly rejected it by finding that the motor home "fail[ed] to perform as represented in the warranty?" Notably, Forest River has not challenged the sufficiency of the evidence supporting this finding.

In any event, the evidence presented at trial showed that the motorhome had a problem with its electrical system, the Warranty covered the electrical system, and that Forest River or its representatives made at least two attempts to repair the problem. (§ 1793.2, subd. (d)(1).) Although Forest River claims that batteries warranted by another manufacturer caused the electrical problems that the Cauchons experienced, the Cauchons' expert witness testified that the motorhome had three separate systems to charge the

batteries, but that something "in the coach" was draining them. Based on this testimony, the jury could reasonably conclude that the nonconforming defect in the motorhome related to its electrical system, not the batteries. (*Oregel, supra*, 90 Cal.App.4th at p. 1102, fn. 8 [buyer must prove that the product did not conform to the manufacturer's express warranty, but need not prove the cause of the nonconformity].)

In its reply brief, Forest River claims it is entitled to a new trial because the trial court prejudicially erred when it denied their motion in limine to preclude the Cauchons from offering testimony about defects in components of the motorhome warranted by other manufacturers. Forest River, however, did not raise this argument in its opening brief. Accordingly, we deem the point to have been waived. (*Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1755, fn. 1.)

V. *Damages Award Offsets*

A. Facts

At trial, Forest River presented evidence that in December 2005, La Mesa RV sent the Cauchons a "good will payment" of \$1,130. The Cauchons also received \$4,434 from Forest River as reimbursement for mileage placed on the motorhome when Forest River drove the motorhome to and from its Indiana facility in 2006.

The court instructed the jury that "Forest River [was] entitled to an offset against the [Cauchons'] claimed damages for the total amount of any and all payments or monies received by the [Cauchons] from Forest River and La Mesa RV related to the subject motor home." The verdict form asked the jury to determine the purchase price of the motorhome, and then subtract from this figure the value of the Cauchons' use of the motorhome before

they discovered the defect. The jury valued the Cauchons' use of the motorhome before they discovered the defect at \$0. The verdict form also asked the jury to subtract from the purchase price any reimbursements the Cauchons received from Forest River. The jury wrote on the verdict form "and La Mesa RV," indicating that it also considered any money that the Cauchons had received from La Mesa RV. With this change, the jury found that the Cauchons had received \$4,434 in reimbursements.

B. Analysis

Forest River claims the judgment must be reversed because the jury failed to offset the damages award to address: (1) the Cauchons substantial use of the motorhome; (2) the fair rental value of the motorhome when the Cauchons used it as their permanent residence; and (3) any payments or monies received by the Cauchons from Forest River, La Mesa RV, or any other source in any way related to the motorhome. We disagree.

The Act provides for an offset only where the buyer uses a nonconforming vehicle before the vehicle is first delivered to the manufacturer for correction of the nonconformity. (§ 1793.2, subd. (d)(1) [where manufacturer does not repair goods to conform to a warranty it shall either replace the goods or reimburse the purchase price "less that amount directly attributable to use by the buyer *prior* to the discovery of the nonconformity," italics added]; *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1242-1244 (*Jiagbogu*) [rejecting manufacturer's contentions that buyback request under the Act amounts to contract rescission, and that the trial court should have instructed the jury that manufacturer was entitled to post-rescission offset for buyer's continued use of vehicle after he requested a buyback, or that trial court should have exercised its "equity powers" to grant an offset for

such use].) As the *Jiagbogu* court explained, "[t]he predelivery offset creates an incentive for the buyer to deliver a car for repairs soon after a nonconformity is discovered. An offset for the buyer's use of a car when a manufacturer, already obliged to replace or refund, refuses to do so, would create a disincentive to prompt replacement or restitution by forcing the buyer to bear all or part of the cost of the manufacturer's delay. Exclusion of such offsets furthers the Act's purpose." (*Id.* at p. 1244.)

Although Forest River was entitled to an offset for the Cauchons' use of the motorhome *before* they discovered the defect, Forest River ignores the evidence showing that defects in the motorhome manifested themselves immediately and that the jury's determination that *nothing* should be subtracted to address the value of the Cauchons' use of the motorhome before they discovered the defect. Substantial evidence supported the jury's determination because the Cauchons experienced electrical problems on the day they took delivery of the motorhome. Forest River is not entitled to an offset for any use of the motorhome *after* the Cauchons discovered this defect.

As to the amount the jury subtracted to cover previous reimbursements, Forest River claims the jury erred by not subtracting the \$1,130 that the Cauchons received from La Mesa RV as a "good will payment." Forest River, however, presented no argument explaining why the jury erred in not reimbursing it this amount. Rather, it appears the jury considered this payment as evidenced by its handwritten notation on the verdict form that it also considered payments made by La Mesa RV, but concluded that Forest River was not entitled to the offset. Without any additional evidence explaining the factual basis for the payment from La Mesa RV, Forest River cannot show that the jury erred when it rejected the vague

testimony regarding this payment. Thus, we conclude the jury did not err in deciding the damages award offsets.

VI. *Exclusion of Evidence*

A. Facts

The parties filed a number of in limine motions seeking to exclude certain evidence. As relevant to this appeal, the Cauchons sought to exclude evidence of: (1) Roderick Cauchon's 25-year-old felony conviction for conspiracy to sell cocaine; (2) their 1998 bankruptcy; (3) their application for financing and credit history; and (4) their income. The trial court tentatively granted the motions addressing the prior conviction and bankruptcy, but deferred ruling on the motions pertaining to the Cauchons finances because it "need[ed] to see how the evidence develop[ed]." Counsel then addressed some of the court's rulings, including the motions regarding the prior conviction and bankruptcy.

Forest River argued that the bankruptcy evidence was admissible to show that the Cauchons did not have the finances to maintain the motorhome. The trial court admitted that the evidence had some relevance and probative value, but excluded it as prejudicial. It then noted that the bankruptcy evidence would not be admitted until it was required to rebut some assertion made by the Cauchons or to impeach them. Forest River argued that the evidence of Roderick Cauchon's prior felony conviction was admissible to impeach statements he made under oath that the conviction was in the process of being expunged. Defense counsel argued that Roderick Cauchon had admitted the prior conviction and had made no contradictory statements. The trial court adopted its tentative ruling because the conviction was "stale." It also noted that while the evidence might contradict other statements that

Roderick Cauchon had made under oath, it would be excluded as impeachment on a collateral matter. The court, however, indicated its willingness to "reopen" the matter if the situation changed.

During trial, Roderick Cauchon testified that during the motorhome trip he did not work and that his family did not have other income. When counsel for Forest River asked Roderick Cauchon whether he had sold the family home, defense counsel objected to the line of questioning as irrelevant. The trial court heard argument at sidebar without a court reporter. The trial court later sustained relevancy objections to questions asking Roderick Cauchon whether he: (1) took a second mortgage on the house to obtain the \$120,000 down payment for the motorhome; (2) had any trouble obtaining financing for the motorhome; and (3) mentioned to the lending company that he and his wife had quit their jobs. Roderick Cauchon later admitted that when the family moved to Arizona, he intended to sell the motorhome.

Outside the presence of the jury, plaintiffs' counsel expressed concern that Forest River was disregarding the trial court's rulings on the in limine motions. The trial court stated that it had permitted some inquiry about financing because plaintiffs' counsel had opened the door during his direct examination as to the Cauchons' funding sources.

B. Analysis

Forest River sought to introduce the evidence of the Cauchons' finances to demonstrate that they: (1) filed this action to avoid paying the balance they owed on the motorhome; (2) could not afford to perform the routine maintenance on the motorhome; and (3) that their failure to maintain it contributed to the problems they experienced. Forest

River claims that the trial court's decision to exclude evidence of the Cauchons' finances prevented it from having a fair trial. We disagree.

On a motion in limine to exclude evidence, the trial court must weigh the probative value of the evidence against the likelihood that its admission will "necessitate undue consumption of time or . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) We review rulings on motions in limine for an abuse of discretion. (*Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 456, disapproved on other grounds in *People v. Freeman* (2010) 47 Cal.4th 993, 1006, fn. 4.) A party challenging discretionary rulings on motions in limine must demonstrate the court's "discretion was so abused that it resulted in a manifest miscarriage of justice." [Citation.] (*Ibid.*; Evid. Code, § 354.) Moreover, even where evidence is improperly excluded, the error is not reversible unless "it is reasonably probable a result more favorable to the appellant would have been reached absent the error. [Citations.] [Citation.]" (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1013.)

It is the appellant's burden to make an affirmative showing of error by an adequate record. (*Buckhart v. San Francisco Residential Rent etc., Bd.* (1988) 197 Cal.App.3d 1032, 1036.) Because in limine rulings are by their nature tentative (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1430), such a ruling "made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, . . . [make an] offer of proof and press for a final ruling in the changed context of the trial evidence itself." (*People v. Holloway* (2004) 33 Cal.4th 96, 133; Evid. Code, § 353, subd. (a).)

As a threshold matter, Forest River did not present any argument in its opening brief showing that the trial court erred by excluding evidence of Roderick Cauchon's prior felony conviction. We deem the point waived. (*Wurzl v. Holloway*, *supra*, 46 Cal.App.4th at p. 1755, fn. 1.)

Forest River claims that excluding evidence about the Cauchons' finances denied it a fair trial. However, assuming without deciding that the trial court erred in excluding this evidence, Forest River has not shown how it is reasonably probable that a result more favorable to it would have been reached absent the assumed error because the Cauchons' finances were not relevant to the jury's determination of whether Forest River breached its obligations under the Act. (*Vorse v. Sarasy*, *supra*, 53 Cal.App.4th at p. 1013.) Stated differently, if the motorhome was a lemon, Forest River needed to prove that it had satisfied its obligations under the Act regardless of the Cauchons' financial difficulties. Accordingly, Forest River has not shown a miscarriage of justice based on the assumed error.

VII. *Sufficiency of Evidence to Support Civil Penalty*

A. Facts

The verdict form asked the jury to calculate the Cauchons' total damages, which it computed at \$208,844.09. It then asked the jury whether Forest River "willfully failed" to repurchase or replace the motorhome, and if it answered affirmatively, "[w]hat amount, if any, do you impose as a penalty? You may not exceed two times" the total damages. The jury imposed a penalty of \$52,211.

B. Analysis

Forest River asserts it presented undisputed evidence showing that it was attentive to the Cauchons' complaints and worked extensively with them to address their concerns. It contends that the Cauchons presented insufficient evidence to establish a willful violation of the Act. Accordingly, it asserts the entire civil penalty award should be reversed as unsupported by the evidence.

The Cauchons do not challenge Forest River's characterization of the record regarding its good will in addressing their complaints or attempting to repair the motorhome; rather, they contend the low penalty award shows that the jury found some willful conduct justifying a penalty, but that the conduct was not highly egregious. They assert that Forest River's lack of knowledge regarding the Act justified the award. We agree.

A jury may award penal damages of two times the total damages award if it determines that the defendant "willfully" failed to comply with the Act. (§ 1794, subd. (c).) The penalty "is imposed as punishment or deterrence of the defendant, rather than to compensate the plaintiff" and is akin to punitive damages. (*Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, 184.) A violation is "not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present." (*Id.* at p. 185.)

"When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence, but rather determine whether, after resolving all conflicts favorably to the prevailing party, and according the prevailing party the benefit of all reasonable inferences, there is substantial evidence to support the judgment." (*Scott v. Pacific Gas & Electric Co.*

(1995) 11 Cal.4th 454, 465, disapproved on other grounds in *Guz v. Bechtel National, Inc.* (2010) 24 Cal.4th 317, 352, fn. 17.) We determine whether there is any substantial evidence, contradicted or uncontradicted, which will support the judgment. When two or more inferences can be reasonably deduced from the facts, we cannot substitute our deductions for those of the trial court. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.)

Here, the Cauchons alleged that Forest River willfully violated the statute when it failed to replace the motorhome or refund the purchase price under the Act. They presented evidence showing that Forest River's representative in charge of claims under the Act had only a "vague or general understanding" of the Act, and had received no training or instructions about how to handle claims under it. In fact, the whole company lacked any type of training or instruction regarding the California Lemon Law, even though it sold vehicles in California. Based on this testimony, the jury could reasonably conclude that Forest River's choice to remain ignorant of its obligations under the Act constituted willful conduct that justified a civil penalty. This evidence was sufficient to support the jury's modest civil penalty award.

VIII. *Award of Attorney Fees*

A. Facts

The Cauchons moved for an award of attorney fees under the Act seeking \$194,716.50 as the lodestar amount for work performed on the merits of the case, and \$10,000 for work performed toward the recovery of attorney fees (fees for fees). They also requested a 0.6 multiplier, to reflect the skill displayed in presenting the case, the results

obtained, the contingent risk counsel took and the delay in receiving payment for their services, for a fee enhancement of \$116,829.90. In support of the motion, the Cauchons presented 70 pages of billing records itemizing the services provided, the rate charged, and the time spent for each service. Attorney Brian K. Cline also submitted a declaration attesting to the requested fees, comparing the rates sought with other attorneys, and indicating that counsel took the Cauchons' case on a contingency basis.

Forest River objected to the motion on the grounds the fees sought were unnecessary, duplicative and excessive, the hourly rates sought exceeded San Diego market rates, and that the requested multiplier should be denied. The trial court denied the multiplier and the request for fees to prepare the motion, and awarded the Cauchons \$170,000.

B. Analysis

Attorney fees under the Act are recoverable if they were "reasonably incurred by the buyer in connection with the commencement and prosecution" of an action. (*Levy v. Toyota Motor Sales, U.S.A., Inc.* (1992) 4 Cal.App.4th, 807, 813.) Forest River contests the amount of the award, claiming a reasonable award would have been \$145,335. It repeats the same arguments it made in the trial court in opposing the Cauchons' motion for an award of attorney fees. We briefly address each argument and conclude the court did not abuse its discretion by awarding the Cauchons \$170,000 in reasonable attorney fees.

We begin with the fundamental rule of appellate review: that the lower court's orders are presumed correct, all intendments and presumptions are indulged in its favor, and ambiguities are resolved in favor of affirmance. (*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 765-766.) In awarding attorney fees, the trial court first establishes a

lodestar figure, by multiplying the time spent by a reasonable hourly rate for private attorneys in the community conducting non-contingent litigation of the same type. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1133 (*Ketchum*).) Ordinarily, the lodestar amount is established based upon the evidence presented by the fee applicant, and such evidence is certainly sufficient if it consists of declarations from counsel and billing records setting forth the hourly rates charged, the hours expended, and the services performed. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096 (*PLCM Group*).) Such records "are entitled to credence in the absence of a clear indication the records are erroneous." (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 396.)

After determining the lodestar figure, the trial court may exercise its discretion to increase or decrease the figure based on any number of factors, typically including: (1) the novelty and difficulty of the questions involved and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; and (3) the contingent nature of the fee award, based on the uncertainty of prevailing on the merits or on the fee claim. (*Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 834.) The trial judge is in the best position to evaluate the professional services rendered at trial and the amount of attorney fees to award is a matter within its sound discretion. (*PLCM Group, supra*, 22 Cal.4th at pp. 1095-1096.) We will not disturb that determination unless convinced that the trial court's judgment is clearly wrong. (*Id.* at p. 1095.)

In support of the motion, the Cauchons' counsel submitted a declaration generally explaining the services rendered and provided detailed billing statements that described each

service rendered, the time expended, and the hourly rate. In opposition to the motion, Forest River detailed 18 instances of alleged improper billing, and requested that the court reduce the number of hours for particular tasks and particular attorneys by a certain amount. It provided a chart that totaled the reduction of hours for each attorney. Among other things, Forest River complained of duplicative billing for inter-office conferences, attorneys performing tasks of a clerical nature, traveling to inspect the motorhome in Arizona, and having multiple attorneys participating at trial or otherwise duplicating efforts. The trial court impliedly agreed with many of Forest River's arguments because it reduced the requested award by \$24,716.50.

On appeal, Forest River repeats its arguments, but without the detail provided to the trial court. The trial court was aware of the work performed by counsel and therefore had the best perspective to evaluate the reasonableness of the billing entries. (*Ketchum, supra*, 24 Cal.4th at p. 1132.) Forest River presented us with no evidentiary basis to second-guess the conclusion of the trial, and we have no basis to reverse that decision as an abuse of discretion.

Documentation submitted in support of the motion revealed that counsel billed the Cauchons the following rates over the life of the case: Brian Bickel (Partner), \$265/\$275/\$295; Craig Quon (Associate Admitted to Bar 7/2000), \$195/\$205/\$225; Amanda Gray (Associate Admitted to Bar 12/2006), \$165/\$175/\$195; and Brian Cline (Associate Admitted to Bar 12/2006), \$195. They also presented evidence of rates charged by consumer attorneys in other parts of California including Northern California, La Crescenta,

Fresno and Bellflower ranging from \$350 to \$515 for partners, and \$250 to \$375 for associates.

Forest River argued to the trial court that the hourly rates charged by the Cauchons' attorneys exceeded those charged by San Diego attorneys in similar cases, and that the evidence of rates charged by other attorneys in other locations was irrelevant, hearsay and lacked foundation. It presented evidence to the trial court regarding the hourly rates charged by a consumer warranty law firm in Los Angeles as ranging from \$165 to \$195 for partners, and \$145 to \$165 for associates. Forest River repeats its arguments to us, again claiming that the trial court erroneously considered inadmissible evidence presented by the Cauchons regarding the rates charged by attorneys outside of San Diego.

A moving party may prove the appropriate market rate to be used in calculating the lodestar through its own affidavits, without additional evidence. (*Davis v. City of San Diego* (2003) 106 Cal.App.4th 893, 903.) Additionally, in assessing a reasonable hourly rate, the trial court may consider the attorney's skill as reflected in the quality of the work, as well as the attorney's reputation and status (see *Ketchum, supra*, 24 Cal.4th at pp. 1138-1139), and the trial court could rely on its own experience in judging the value of the services rendered (*PLCM Group, supra*, 22 Cal.4th at pp. 1095-1096). Thus, irrespective of the evidence the Cauchons presented of even *higher* rates charged by counsel outside of San Diego, Forest River has not shown how the trial court abused its discretion when it impliedly concluded that the hourly rates charged by the Cauchons' attorneys did not exceed the rates commonly charged by San Diego attorneys in similar cases.

In summary, we are not persuaded that the trial court abused its discretion in deciding the reasonable attorney fees to award under the Act.

DISPOSITION

The judgment and the orders denying defendant's motion for judgment notwithstanding the verdict and new trial, and granting plaintiffs' motion for attorney fees are affirmed. Plaintiffs are entitled to recover their costs on appeal.

McINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.